STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2004
v	No. 246757 Washtenaw Circuit Court
AKIDA SHAMA COLE, Defendant-Appellant.	LC No. 01-002012-FC

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to twenty to thirty years' imprisonment for his murder conviction, two to five years' imprisonment for the CCW conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

I. Material Facts

On December 14, 2001, defendant, Jimmy Dale McDonald, and Otis Jones were at Lamar Thomas's home. McDonald purchased a bag of marijuana from Thomas. McDonald became confrontational[1] and made reference to his accessibility to a certain weapon. Thomas later asked McDonald and defendant to leave his home because two arguments ensued between them, one regarding Jones and the other regarding defendant's girlfriend. McDonald and Jones left Thomas's home, but returned because McDonald forgot his cell phone. After McDonald and Jones returned, defendant appeared fearful, and hid behind a door. McDonald retrieved his cell phone, left Thomas's residence again, and he and Jones went to get something to eat.

Later, on December 15, 2001, approximately four black males assembled between 537 and 539 First Court. On their way to Jones's sister's house, McDonald and Jones met with Chrissy Evans, and began talking. Defendant approached the group, and waited for them to finish talking. Defendant then stated, "So what's happening with that, Jimmy Dale?" McDonald

[1] McDonald had been drinking that night, and he had a reputation for behaving in a violent manner when drinking.

replied, "And it ain't even like that." Defendant then pulled out a gun, and shot McDonald twice. McDonald fell, and defendant ran away. McDonald subsequently died as a result of the gunshot wound.

After the incident, Thomas Eberts of the Ypsilanti Police Department interviewed defendant. Although defendant initially denied shooting McDonald, he later admitted that he shot him. Defendant explained that he got into an argument with McDonald, and that he felt threatened by him. Defendant also indicated that he used a .25 caliber semi-automatic pistol to do the shooting, and that he gave the weapon to a friend.

II. Composition of Jury Venire

Defendant first argues that he was denied his right to a trial by a jury representing a fair cross-section of the community because there was only one African-American in the jury venire. Specifically, defendant's argument seems to focus on the alleged "systematic exclusion" of African-Americans from the jury venire.

"Questions concerning the systematic exclusion of minorities in jury venires are generally reviewed de novo." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). We find that defendant has failed to demonstrate a violation of the fair cross-section requirement.

As explained by our Supreme Court, "The Sixth Amendment of the United States Constitution guarantees criminal defendants a trial by an impartial jury." *People v Smith*, 463 Mich 199, 203, 213; 615 NW2d 1 (2000) (Cavanagh, J. concurring, but joined by majority). The Court stressed that if distinctive groups, such as African-Americans, are excluded from jury pools, the purposes of a jury go unserved. *Id*. at 203, 214-215. Therefore, the United States Supreme Court has "'declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community,'" and has required that "'petit juries must be drawn from a source fairly representative of the community.'" *Id*., quoting *Taylor v Louisiana*, 419 US 522, 527, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975). However, the fair cross-section requirement does not guarantee that any particular jury actually chosen must mirror the community. *Smith*, *supra* at 203, 214. "Rather, the [United States Supreme] Court explained that 'jury wheels, pools or names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative therof,' for the fair cross-section requirement to be satisfied." *Id*.

In evaluating claims such as defendant's, we must apply the following test:

> "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [*Smith, supra* at 203, 215, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Regarding the second prong of the *Duren* test, the Michigan Supreme Court indicated that rather than any systematic approach, a case-by-case analysis should be used to determine whether representation was fair and reasonable. *Smith*, *supra* at 203-204. Therefore, if the parties proffer sufficient evidence, the courts should consider the results of all the tests in determining whether representation was fair and reasonable. *Id*. at 204.

There is no dispute that the first prong of the *Duren* test has been met in this case, as defendant contends that African-Americans were systematically excluded from the jury venire. *Smith*, *supra*. Under the second prong, there are three methods typically utilized to determine whether the representation of the group is fair and reasonable in relation to the number of such persons in the community, which include the absolute disparity test, the comparative disparity test, and the standard deviation test. *Id*. at 203. Here, defendant merely offered a census report to indicate that African-Americans between the ages of twenty and fifty made up over 13.3% of Washtenaw County's population. Defendant presented no other evidence at trial that there was any disparity between the number of jury-eligible African-Americans and the actual number of African-American prospective jurors selected to the Washtenaw County Circuit Court jury pool list. *Smith*, *supra*. "Merely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *People v Williams*, 241 Mich App 519, 533; 616 NW2d 710 (2000). Thus, defendant has failed to meet the second prong of the *Duren* test.

Further, defendant has failed to demonstrate that the alleged underrepresentation was systematic, "'that is, inherent in the particular jury-selection process utilized.'" See *Smith*, *supra*. At trial, defendant relied solely on the census report in support of his argument that African-Americans were systematically excluded from the jury venire. Defendant presented no evidence regarding the racial composition of the larger jury venires, from which the panel had been selected. "A systematic exclusion is not shown by one or two incidents of a venire being disproportionate." *People v Hubbard (After Remand)*, 217 Mich App 459, 481; 552 NW2d 493 (1996). Moreover, defendant's bald assertion that systematic exclusion must have occurred because there was only one African-American in his particular jury venire is insufficient to make out a claim of systematic exclusion. *Williams*, *supra* at 526-527. Here, defendant presented no evidence concerning the representation of African-Americans on jury venires in general in Washtenaw County, and merely relied on the fact that there was only one African-American in his particular jury venire. See *People v Howard*, 226 Mich App 528, 532-534; 575 NW2d 16 (1997). Accordingly, defendant has failed to meet the third prong of the *Duren* test.

Defendant speculates that various factors, such as economic, social, or religious factors, may lead to a jury venire that does not reflect a cross-section of the community, or that "[f]ailure to return jury questionnaires by the African-American community due to reluctance to respond to the government's inquiry because of past discrimination or perhaps they move more often and do not receive the questionnaires could account for under-representation." Although defendant complains that the trial court did not follow-up on issues regarding the jury questionnaires, defendant did not present such questions at trial, and raises them now for the first time on appeal, again without any factual support. Additionally, the trial court fully explained the jury venire process, which consists of the random selection of names from those individuals holding a driver's license or state identification card, and which does not appear to systematically exclude

African-Americans from the jury venires. Therefore, defendant has failed to establish a prima facie case of a violation of the fair cross-section requirement.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor engaged in prosecutorial misconduct at trial. We disagree.

Defendant failed to preserve this issue by making an appropriate objection at trial regarding his claims of prosecutorial misconduct. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Therefore, this issue must be reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative." *Id*., citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Issues of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the prosecutor's remarks in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Id*.

Defendant first contends that the prosecutor improperly bolstered Eberts' credibility. A prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witness the jury believes. *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983).

Here, upon reviewing the prosecutor's comments in context, we find that the prosecutor's comments that "you've got to believe him," and that "he's beyond reproach," do not constitute improper bolstering of Eberts' testimony. The prosecutor did not personally vouch for Eberts. Rather, the prosecutor made proper argument and comment on the credibility of the trial witness. Eberts testified that he did not coerce defendant or use force in order to make defendant provide a statement regarding his involvement in this case. Accordingly, the prosecutor properly discussed Eberts' credibility as a witness, and the relation of Eberts' testimony with defendant's theory of the case.

Additionally, even if the prosecutor's remarks were improper, reversal is not warranted. The trial court instructed the jury that "[t]he lawyers' statements and their arguments to you are not evidence. They're only meant to help you understand the evidence and each side's legal theories." Thus, even assuming error, it "was cured by a cautionary instruction that 'arguments of counsel are not evidence.'" *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, defendant has failed to demonstrate a plain error affecting his substantial rights.

Defendant also contends that the prosecutor improperly appealed to the jury for sympathy by commenting that there were no memorials for McDonald and that "[t]his is his one chance to make sure the world isn't bored with his tragedy, to make sure that his death in an untidy spot

doesn't go unnoticed." "This Court has held that '[a]ppeals to the jury to sympathize with the victim constitute improper argument.'" *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003), quoting *Watson, supra* at 591. As in *Akins* and *Watson*, the prosecutor's comments were isolated in nature, and do not constitute a "blatant" appeal to the jury's sympathy, nor were the prosecutor's comments so inflammatory that they prejudiced defendant. *Akins*, *supra*; *Watson, supra*. Additionally, the trial court instructed the jury, "You must not let sympathy or prejudice influence your decision." Thus, under these circumstances, defendant was not prejudiced by the prosecutor's remarks, and reversal is not required on this basis. *Akins*, *supra*; *Watson, supra*. Again, defendant has failed to demonstrate a plain error affecting his substantial rights.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray